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MEMORANDUM

TO: **Borough Assembly Members**

FROM: **Bob Molloy • Molloy Schmidt LLC**

CC: **Borough Mayor Pierce**
Through: **Borough Clerk Blankenship**

DATE: **11/09/20**

SUBJECT: **Ordinance 2020-45, Amending Code on Borough Planning Commission and Subdivisions, and Repealing and Replacing Code on Procedures for Vacations**

The proposal made in Ordinance 2020-45 includes a repeal of existing Chapter 20.70 VACATION REQUIREMENTS and its replacement with Chapter 20.65 VACATIONS. The Assembly should take its time in reviewing this complete repeal and replacement, and enact amendments, if the Assembly moves forward with repeal and replace.

I have been a partner in law firms for nearly 40 years, and have represented real property developers and owners in many types of administrative agency matters or proceedings, including both applicants for, and opponents of, right-of-way and easement vacations. The cumulative changes to administrative procedures in replacement Chapter 20.65 VACATIONS, as currently presented, when considered as a whole, unduly limit the discretion of the Planning Commission, increase the burden on affected private property owners and remove the Assembly from any oversight role at all.

These comments do not strictly follow the linear page order.

Comments on Section 37 Enactment of KPB 20.65 as Repeal and Replacement of 20.70

20.65.050(F), pp. 26-27	"The planning commission shall consider the merits of each vacation request ... "

-- In general, Subsection (F) has some subsections that will lead to many disputes. And Subsection (F) also does not provide the Planning Commission with sufficient flexibility for its task of reasonable regulation of land use.

20.65.050(F), pp. 26	".. *and in all cases the planning commission shall deem the area being vacated to be of value to the public.*" (Emphasis supplied)

-- The phrase "*and in all cases the planning commission shall deem the area to be vacated to be of value to the public*" in the first sentence, quoted above, establishes an awkward and vague presumption, a presumptive finding and conclusion by the Planning Commission, which the applicant must rebut in the applicant's presentation to the Planning Commission.

-- Rights-of-way and easements have many different origins, the property history may be complex, and some easements, such as Small Tract Act patent easements, (which are not dedicated ROWs), may have no real value to the general public, as distinguished from the government (for roads and utilities) and property owners (also for roads and utilities to their properties). As an example, there are many Small Tract Act patent ROWs reserved in many private property lots in the Borough, and the Borough has indicated no interest in developing many of these patent ROWs as roads.

-- What is the spectrum or range of values for "*of value to the public*," especially if the easement, which is not a dedicated ROW, is not developed or constructed and is not being used by the general public, or if the Borough has no plan to develop the easement?

-- If an opponent appeals a Commission decision granting a petition to vacate, the applicant-petitioner will have to show that this Code presumption has been rebutted under applicable law and the evidence presented at the hearing.

20.65.050(F), pp. 26-27	"It shall be incumbent upon the applicant to show that the area proposed for vacation is no longer practical for the uses or purposes authorized, or that other provisions have been made which are more beneficial to the public.

-- The second sentence also establishes a burden of proof on the applicant, but limits the applicant to showing (1) that the area proposed for vacation is not longer practical for the uses or purposes authorized, or (2) that other provisions have been made that are more beneficial to the public. The flexibility of other factors should be allowed, such as; (3) and/or that the area is not developed or constructed, or is not used by the public, or is of little or no value to the public; (4) and/or that neither the Borough or any other governmental agency has shown any interest in developing the easement for the public; (5) and/or any other reason supporting the proposed vacation.

20.65.050(F), pp. 26-27	"In evaluating the merits of the proposed vacation, the planning commission shall consider whether: ..." factors (1) -- (7)

-- Subsection (F) also limits the discretion of the Planning Commission by limiting the factors that the Commission "**shall consider**" to subparagraphs (1) through (7). The Commission also should be able to consider, as an example: "(8) any other factors that are relevant to the vacation application or the area proposed to be vacated."

20.65.010, p. 25	Defining a "vacation decision" to be a "discretionary legislative land use decision"

-- This is a significant change that has major effects on affected private property owners.

-- Some municipalities do define a Planning Commission's decision to be a "legislative" decision, but to my knowledge, there has not been an appeal of those ordinances decided by the Alaska Supreme Court. Under Alaska law, the test for when a governmental body is acting as an administrative agency is functional. The Alaska Supreme Court has held that the **Kenai Peninsula Borough Assembly**, in its role as the Borough's legislative body, may classify its municipal land, and that the Assembly's classification of its municipal land is a legislative act, because the Assembly is not applying general policy to particular persons in their private capacities when classifying its municipal land. *Cabana v. Kenai Peninsula Borough*, 21 P.3d 833, 835-36 (Alaska 2001).

-- In contrast, when the Planning Commission makes a vacation decision, the Commission is tasked with hearing and deciding issues of law and fact in terms of specific parties and specific transactions, which is functionally acting in a quasi-judicial capacity.

-- If an affected private property owner is in a dispute with the petitioner - applicant and Planning Department staff over whether the affected private property owner has a property interest in the easement proposed to be vacated, the elimination of all appeal procedure at the Borough level (before appeal to superior court) harms the affected private property owner, who is also a taxpayer.

- Such disputes may be infrequent, because in most cases, the petitioner and affected property owners agree that the ROW or easement is a public ROW or public easement.

- Whenever affected private property owner(s) claim(s) a private interest in the easement proposed to be vacated, the Borough must provide a public hearing with due process safeguards for the petitioner - applicant and the affected private property owner(s), even if the Assembly adopts the major change to "discretionary legislative land use decision." For due process, the Borough must provide an impartial decision-maker, notice and the opportunity to be heard, some of the procedures consistent with the essentials of a fair trial, and a reviewable record. *Nash v. Matanuska-Susitna Borough*, 239 P.3d 692, 699 (Alaska 2010).

ADDITIONAL PROCEDURE AT PLANNING COMMISISON LEVEL:
-- For the infrequent case where competing private property rights are disputed, the Assembly can add a Code section, per AS 29.40.170, that authorizes the Planning Commission to delegate powers to hear and decide such cases to a hearing officer. Complex cases may be infrequent, but this procedure would give the Planning Commission the discretion to delegate complex cases to a hearing officer, and allow both the petitioner - applicant and the affected private property owner(s) to make a detailed, reviewable record in case of a further appeal, either to an appellate hearing officer or to the superior court.

PROCEDURE FOR APPEAL FROM DECISION AT PLANNING COMMISSION LEVEL:

-- Under the replacement code, (KPB 20.65.050(M) at p. 28), an affected private property owner no longer has any right to appeal an adverse Planning Commission decision within the Borough, either to a hearing officer or to the Assembly. There would be no appeal at the Borough level; this repeal harms affected property owners, who are also taxpayers.

-- Because of the short timeline between the date when the meeting packet with staff report is distributed and the date of the Planning Commission hearing, affected private property owners have very little time within which to make a record before the Planning Commission, especially if they claim private property rights in the easement. Then the appeal to the superior court is on the record before the Planning Commission (it is very rare for the superior court to grant a request for a de novo hearing).

-- The Assembly could provide for an appeal of a vacation decision to a hearing officer, before appeal to the superior court, as the Assembly does for other appeals, if the Assembly does not want to provide for an appeal to the Assembly as a Board of Adjustment (as it had provided for a Board of Adjustment procedure in Code in the past).

20.65.040, p. 25	Vacation application, first sentence: " An informal pre-application conference by appointment with borough staff prior to the submittal of the application for vacation of a public right-of-way is encouraged."

-- This encouragement of an "informal pre-application conference" is an optional procedure that will benefit applicants and staff. But why limit this option to applications "for vacation of a public right-of-way"?

20.65.050(B), p. 26	After acceptance of the application

-- Similar to an "informal pre-application conference," there should be the opportunity for the applicant and staff to have a pre-staff report conference regarding issues which staff have identified before the staff report is finalized. This optional procedure could save applicants significant expense.

20.65.050(E), p. 26	Placement on Agenda and postponement requests

-- The second sentence -- "The public hearing on the vacation may not be more than 60 days after acceptance of the application, unless the applicant requests postponement" -- unduly restricts the discretion of the Planning Commission.

-- In *South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Board of Adjustment*, 172 P.3d 778, 773 (Alaska 2007), the Supreme Court of Alaska ruled that it is always within the discretion of the municipal administrative body to relax or modify its procedural rules adopted for the orderly transaction of business before it on appeal in a given case when the procedural rules are discretionary and the ends of justice require it. This Code change eliminates the Planning Commission's discretion. While the Supreme Court was

specifically addressing administrative appeals, this concept also applies to the Planning Commission as a decision-making body.

-- This Code change restricts the Planning Commission to considering only the applicant's request for postponement. The Planning Commission may not consider any other factors, such as a request by an affected private property owner who has not received a mailed notice of the hearing or who claims a private interest in the easement proposed to be vacated; and the Planning Commission may not consider its own business calendar or availability of Borough staff.

20.065.060 (A), pp. 28-29	Title to vacated area

-- Paragraph A is confusing; may submit comments later.

20.065.060 (C), p. 29	Title to vacated area

-- Paragraph C invites arbitrary action by the Planning Commission and has the potential to discourage property development plans that involve vacations.

-- Applicants often incur significant expenses for professional fees for surveyors, and sometimes for engineers and attorneys. But Paragraph C allows the Planning Commission, at the hearing, without any prior notice, "to determine all or a portion of a vacated area should be dedicated to another purpose," and deny the petition.

-- The use of the word "title" in this context also presents issues for the property owners, because not all ROWs and easements are the same. Most easements are encumbrances on the property owner's title (the "servient estate"), and the easement does not give title to the user ("the dominant estate").

20.065.070, pp. 29-30	Alteration of platted easements

-- The last sentence of Paragraph (A), p.29, states: "For purposes of types of easements covered by this section, the KPB 20.90.010 definition for Utility Easement control."

---- This restriction will lead to disputes over whether an easement platted solely as a drainage easement, and intended to be a drainage easement, is a utility easement.

-- May have other comments, but have run out of time.

Other Comments

Sec. 11, 25.20.070(F), p.	Delete "travel ways."

-- -- Do not require "travel ways" to be shown on preliminary plats. "Travel ways" are roads or rights-of-way that are private, not public. Because of the certification text required on plats by Code, the depiction of private "travel ways" on plats has led to expensive law suits where the landowner has had to litigate against a claim that the "travel way" was dedicated to the public by plat due to the certification text, even though there was never a dedication or grant to the public.

The Assembly's consideration of these comments is appreciated. Thank you.

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November 9, 2020

Charlie Pierce, Mayor, Kenai Peninsula Borough
Kenai Peninsula Borough Assembly Members
144 N. Binkley St.
Soldotna, Alaska 99669

Re: ORDINANCE 2020-45

Dear Mayor Pierce and Borough Assembly Members:

I request that you table Ordinance 2020-45 for the time being, especially as the Assembly has 3 new members, there is a new Planning Department director, and there are many problems with the ordinance as written. I request (and hope) that you will hold some additional meetings about this ordinance, with real estate professionals and communities, as the Borough did for the 2014 Planning Code rewrite (but not for this 2020 rewrite).

Our law firm has represented private property owners/developers, on all sides, for 40 years. I also worked for the Borough 1984-1994 as Deputy Borough Attorney; and, while there, worked on many real estate matters for the Borough. Our firm has been involved with many lawsuits over real property disputes. Many of the lawsuits were caused by or complicated by Borough planning department practices and ordinances of the past.

Ordinance 2020-45 is a major rewrite; it is not just "housekeeping." **There are major policy changes in this ordinance that will make it more expensive and burdensome for private property owners/developers.** Below are some examples. There are many other problem sections, that I can bring to your attention if the Assembly postpones action. That is why I am requesting that you table this ordinance for further review.

1. Vacations Will Be Harder And More Expensive for Property Owners, Developers and Others. Section 37, pp. 25-32 of the ordinance.

This is a complete rewrite of the current vacation ordinance, and will cause more expense and difficulty for ***both*** applicants for vacation, and opponents of vacation.

First, Sec. 20.65.050(E), page 26, requires the planning commission to "deem the area being vacated to be of value to the public." This is a ***new*** requirement. This "one size fits all" approach does not take into account the many different kinds of easements and rights of way under federal and State laws that are all over the Borough.

These federal and State easements and rights of way are not platted rights of way in Borough subdivision plats; and the easement rights involved differ greatly. Some of these easements and rights of way may have public value; but others may not.

Many rights of way are very old, and were put in place by the federal government or State of Alaska for reasons that no longer exist. For example, there are many section line easements; some have no utility at all, because the land is too steep, isolated, swampy, and so forth. Some federal rights of way may actually be terminated, but you won't know that unless you do a lot of research in the historical records.

Second, Sec. 20.65.050(E), items (1) through (7), page 27, are very vague and subjective; such as "being used" -- for what? Or "public interest or value" -- how is that determined at the application stage? A property owner trying to prove these requirements will need to hire expensive experts such as lawyers and contractors to submit proof with the application. In addition, it may not be possible for a property owner to provide "equal or superior access" for a right of way to a lake or river. Are they stuck with an unnecessary right of way forever?

Third, Sec. 20.65.060(C), page 29. contains very broad language that allows that Planning Commission to rededicate a vacated area "to another purpose." The language is confusing, but it appears to mean that a property owner/developer could go all the way through the vacation process, only to have the Planning Commission arbitrarily deny the vacation and substitute another purpose for the area requested to be vacated. No property owner or developer is going to take the risk of having this happen; so this requirement restricts development.

2. Requiring Preliminary Subdivision Plats to Include "Travel Ways" Will Only Lead to Property Disputes; the Borough Should Not Take Sides. Section 11, pp. 10-11 of the ordinance.

Section 11 adds a new requirement to KPB 20.25.070: that preliminary plats include "travel ways." This is a mistake. I been involved in at least two lawsuits where these "travel ways" were on both the preliminary plat and final plat, and the people claiming use rights in another person's private property tried to use the showing of a travel way -- even on a preliminary plat -- against the property owner. The claimants will argue that showing a travel way on a plat, especially since it is required by Borough ordinance, is an official Borough action that supports their claim that they have the right to use the travel way.

By requiring travel ways to be shown at all, the Borough is taking sides in a private property dispute. It is not necessary to show existing travel ways that are not public. At a minimum, if there is some critical need for this requirement (not obvious), the ordinance should contain a disclaimer that showing the travel way does not infer a right to use it.

3. New Building Setback "Encroachment" Permits Add Bureaucracy and Expense. Section 5, pp. 6-7 of the ordinance.

This new section, 20.10.110, is a major change that will add a unnecessary layer of bureaucracy and expense to private property ownership and development. It is a complete 180 degree turn from past Borough practice, where a "building setback encroachment" was only an issue when the building interfered with a Borough road right of way that was being maintained; or perhaps interfered with fire trucks or ambulances. That is, the Borough administration did not care how you developed your own property, as long as it did not interfere with Borough services. This ordinance is not even clear that it applies to rights of way.

The section also retroactive: it appears to apply to all buildings that were built within a building setback, back to Borough incorporation in 1965. And these permits have to be approved by the planning commission; which will involve more expense and resources. This permit system seems like complete overkill.

4. The Assembly Has Always Been the Reviewing Body of Planning Commission Decisions on Vacations; Ordinance 2020-45 Removes That Right.

KPB 21.20.230(B) requires the Assembly to hear appeals from Planning Commission vacation decisions, which has always been the case. However, Ordinance 2020-45, in Section 37, 20.65.050(M), page 28, removes the Assembly's right to hear these kind of appeals, and a landowner or interest holder's right to appeal to the assembly -- without any logical explanation. Instead, the new requirement is that vacation appeals have to go directly to superior court.

This new requirement is clearly directed towards people who oppose vacations that have been approved by the Planning Commission. This new requirement is unfair because there is no chance to develop a case at the Planning Commission level, when the opponent to a vacation only has three minutes to speak, and limited ability to present documents in opposition. So the superior court has no real evidence to review. Every other kind of appeal of a planning commission decision goes to a hearing officer. That is why this new requirement, just for vacations, makes no sense.

This effort to remove these rights seems to be arbitrary and punitive. Please remove this language.

Thank you for considering my comments.

Sincerely,

Kristine A Schmidt

KRISTINE A. SCHMIDT